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DATUK MOHD ZAID IBRAHIM v. PEGUAM NEGARA MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[JUDICIAL REVIEW NO: WA-25-23-03-2016]
B 7 NOVEMBER 2016

ADMINISTRATIVE LAW: *Judicial review – Application for – Challenging decision of Attorney General ('AG') that no offence had been committed and instruction for Malaysian Anti-Corruption Commission ('MACC') to close files –*
C *Preliminary objections raised against judicial review application – Decision of AG to prosecute or not to prosecute under art. 145(3) of Federal Constitution – Whether amenable to judicial review – Whether there was encroachment on investigation powers of MACC under MACC Act 2009 – Whether investigation papers of MACC classified as 'secret' by operation of law – Malaysian Anti-Corruption Commission*
D *Act 2009, s. 29*

The applicant's contention in this judicial review application was essentially to challenge the decision of the Attorney General ('the AG') made on 26 January 2016 in a press conference that (i) Dato' Seri Mohd Najib Tun Razak ('the Prime Minister') had not committed any criminal offence based
E on the evidence and recommendations submitted to him by the Malaysian Anti-Corruption Commission ('MACC'); and (ii) that the AG was returning the investigation papers to the MACC with instructions to close the files. In support of this judicial review application, the applicant relied on, *inter alia,* the following grounds (i) upon a true construction of art. 145(3) of the
F Federal Constitution ('FC') read with arts. 5(1) and 8(1) thereof, the AG's decision not to institute any criminal proceedings against the Prime Minister was capable of being the subject matter of judicial review; (ii) that the AG had taken into account irrelevant considerations when arriving at the said decision; and (iii) the said decision constituted an abuse of discretion vested
G in the AG by the provisions of art. 145(3) of the FC and was accordingly null and void. The AG raised preliminary objections mainly on the following grounds (i) it is settled law that the decision by the AG to prosecute or not to prosecute under art. 145(3) of the FC was not justiciable or amenable to judicial review; (ii) the challenge in respect of the instructions to close the
H file (NFA/KUS) was frivolous and vexatious as the instruction does not prohibit the MACC to reopen investigations on new evidence; and (iii) the applicant had failed to cross the threshold *locus standi*.

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Held (dismissing applicant's application):

(1) The effect and meaning of art. 145(3) has been settled by a long line of decisions of the apex courts. These courts have held that the decision of the AG to institute or not to institute criminal proceedings was not justiciable or amenable to judicial review. The avenue of the person being unhappy with the AG's decision was elsewhere and not to the court. (paras 28 & 29)

(2) The instruction of NFA/KUS had nothing to do with the exercise of the AG's discretion under art. 145(3). It merely related to the instructions commonly minuted in the investigation papers after a decision not to prosecute was made. The AG, as, Public Prosecutor the minuted his instruction of 'No Further Action' after deciding that 'no offence committed by the Prime Minister' based on the existing facts and evidence in the investigation papers. The AG had instructed the files to be closed since there was no further action to be taken as no offence was disclosed from the investigation papers. The NFA/KUS in the investigation papers did not impede the MACC to reopen investigations on new evidence. There was no encroachment on the investigation powers of the MACC under the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act'). (paras 35-37)

(3) Pursuant to s. 29 of the MACC Act, the investigation papers of the MACC officer or any such papers in respect of offences under the MACC Act had been opened, it was classified as 'secret' by operation of law. The applicant had no knowledge whatsoever of the facts and evidence the MACC had placed before the AG. The evidence and material which the AG considered in arriving at his decision was therefore not before the court. Hence, neither the court nor the applicant had access to those MACC investigation papers. Thus, there was no purpose for this court to grant leave just for the purpose of investigation on full *inter parte* basis as there was no arguable case in respect of the applicant's application. In light of the above reasons, there was no necessity to consider the issue of the applicant's *locus standi.* (paras 39, 40, 42, 43 & 47)

Case(s) referred to:

DPP v. Humphrys [1976] 2 All ER 497 ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Johnson Tan Han Seng & Other Appeal v. PP [1977] 1 LNS 38 FC ***(refd)***

Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***

Law Society of Singapore v. Phylis Tan [2008] 2 SLR (R) 239 ***(refd)***

Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***

Mohd Rafizi Ramli v. PP [2014] 4 CLJ 1 CA ***(refd)***

A *PP v. Zainuddin Sulaiman & Ors [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC* ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 HC ***(refd)***
Teh Cheng Poh v. PP [1978] 1 LNS 202 PC ***(refd)***
Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 2268 ***(refd)***
Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(foll)***
B *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC* ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, Schedule para 1
Criminal Procedure Code, s. 376
Federal Constitution, arts. 5(1), 8(1), 145(3)
C Malaysian Anti-Corruption Commission Act 2009, s. 29

For the applicant - Amarjit Singh Sidhu; M/s Americk Sidhu
For the respondent - Amarjeet Singh Serjit Singh, Awang Armadajaya, Shamsul Bolhassan & Suzana Atan; SFCs

Reported by Suhainah Wahiduddin

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JUDGMENT

Hanipah Farikullah J:

[1] This case concerned whether the decision of the Attorney General made under art. 145(3) of the Federal Constitution is amenable to judicial E review.

[2] The foundation of the application are decisions made by the Attorney General ("the AG") appearing in a press release issued on 26 January 2016 ("the press release"). The decisions were made pursuant to the submission F of three investigations papers by the Malaysian Anti-Corruption Commission ("MACC") to the AG for his decision.

[3] The applicant's contention in this judicial review application is essentially challenging the decision of the Attorney General made on 26 January 2016 in a press conference.

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[4] The applicant alleges that the AG had on 26 January 2016 revealed in a press conference his decision:

(a) that Dato' Seri Mohd Najib bin Tun Abdul Razak ("the Prime Minister") had not committed any criminal offence based on the evidence and recommendations submitted to him by the MACC; and H

(b) that the AG was returning the investigation papers to the MACC with instructions to close the files.

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Reliefs

[5] In this application, the applicant seeks the following reliefs:

(a) a declaration that the decision not to prosecute the Prime Minister is *ultra vires* of art. 145(3);

(b) a declaration that the decision directing the MACC to close its files on the investigation into offences committed by the Prime Minister is *ultra vires* of art. 145(3);

(c) a direction in the nature of *certiorari* to quash the said decisions; and

(d) a direction in the nature of *mandamus* to compel the AGC to institute criminal proceedings against the Prime Minister.

[6] In support of its application, the applicant relied on the following grounds:

(a) upon a true construction of art. 145(3) of the Federal Constitution read with arts. 5(1) and 8(1) thereof, the respondent's decision not to institute any criminal proceedings against the Prime Minister is capable of being the subject matter of judicial review;

(b) the respondent took into account irrelevant considerations when arriving at the said decision;

(c) the respondent failed to take into account relevant considerations when arriving at the said decision. In particular, the respondent failed to take into account any recommendation made by the MACC when arriving at the said decision;

(d) the said decision by the respondent is unreasonable and is such that no reasonable Attorney General in the shoes of the respondent would have made, given the nature of the evidence placed before him;

(e) the said decision constitutes an abuse of the discretion vested in the respondent by the provisions of art. 145(3) of the Federal Constitution and is accordingly null and void;

(f) the said decision is a violation of the applicant's fundamental right as guaranteed by the provisions of art. 5(1) read with art. 8(1) of the Federal Constitution in that upon a true construction of the said article, the applicant has a right of access to justice and the respondent's public declaration that the exercise of his discretion is not reviewable constitutes an infringement of the applicant's aforesaid right; and

A (g) the respondent is under a legal and/or a constitutional duty to exercise the discretion conferred upon him by the provisions of art. 145(3) with due consideration, reasonably in the public interest and with a sense of justice. Given the totality of the material made available to the respondent by MACC, the respondent failed to act accordingly and is
B therefore amenable to a direction of the nature of *mandamus* under para. 1 of the Schedule to the Courts of Judicature Act 1964.

Preliminary Objections

[7] In gist, the AGC raised preliminary objections mainly on the following grounds:
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(i) it is settled law that the decision by AG to prosecute or not to prosecute under art. 145(3) of the Federal Constitution, is not justiciable or amenable to judicial review;

(ii) the challenge in respect of the instructions to close the file (NFA/KUS) is frivolous and vexatious as the instruction does not prohibit the MACC to reopen investigations on new evidence; and
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(iii) the applicant has failed to cross the threshold *locus standi*.

[8] The role of the AGC at leave stage is stated by the Court of Appeal
E in *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 2268 as follows:

> This then brings me to the significance of the Honorable Attorney General's input at the leave stage of a judicial review application ... It is trite that the 'leave' proceedings are intended to sieve out unwanted or
F frivolous applications before it moves to the substantive stage of proceedings. The assistance required by the Court from the Attorney General's Chambers at this stage, in that context, was to appraise the Court of any particular features of the case that would disqualify any leave being granted to the applicant concerned.
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> The AGC is merely appraising this Honorable Court of features in the
G Applicant's case which would disqualify leave being granted.

[9] The first point that I will deal with is the Senior Federal Counsel's principal contention that the decision of the AG not to institute criminal proceedings under art. 145(3) of the Federal Constitution is non-justiciable
H and hence is not reviewable by the court. As such, learned Senior Federal counsel submitted that this application is an abuse of the court process and should be dismissed.

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[10] Article 145(3) of the Federal Constitution states as follows: A

145. Attorney General

...

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial. B

[11] I will begin with the Federal Court case of *Long bin Samat & Ors v. PP* [1974] 1 LNS 80; [1974] 2 MLJ 152:

(i) In our view, this clause (art. 145(3) from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. C D

(ii) Anyone who is dissatisfied with the Attorney General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts. E

[12] In *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66, the Federal Court was asked to determine whether the AG may discriminate between persons charged for the possession of firearms under different statutes carrying different sentences. The Federal Court followed the interpretation of art. 145(3) in *Long Samat & Ors v. PP* [1974] 1 LNS 80; [1974] 2 MLJ 152 and further held that art. 8(1) is to be read subject to art. 145(3) in the following words: F

(i) As s. 376 of the Criminal Procedure Code was already in existence before Merdeka, our constitution-makers could have been content with relying on it alone to preserve after Merdeka the Attorney-General's pre-Merdeka power, and if they had done so then it might be arguable that after Merdeka it must be read subject to art. 8; but our constitution-makers were not content to do so. They deliberately wrote art. 145(3) into our constitution. In view of the deliberate decision of our constitution-makers to write this provision into our constitution I do not think that it can be said that it must be read subject to art. 8. Rather, in my view, the contrary: art. 8 it is that must be read subject to art. 145(3). G H I

(ii) In deciding that the Attorney-General is not constrained by art. 8 when deciding whether or not to prosecute and if so on what charge, whether a lesser or a greater one, it must not be thought that he may dishonestly. The public of whose interest he is the guardian has a right to expect him to act honestly, without fear of powerful national and local figures or of the consequences to him personally or politically, and without favouring his relatives and friends and supporters, his principal concern being to maintain the rule of law so that there will be no anarchy and to maintain standards in public life and the private sector; and if he did not do his duty honestly and properly, the public would be able to show their disapproval not however in the courts but elsewhere and in the last resort by voting against the party of which he is a member.

[13] The Privy Council in *Teh Cheng Poh v. PP* [1978] 1 LNS 202; [1979] 1 MLJ 50 upheld the interpretation of art. 145(3) by the Federal Court in the following words:

(i) It was contended on behalf of the appellant that the exercise of this discretion by the Attorney General deprived the appellant of his right under art. 8(1) of the Constitution to equality before the law. Their Lordships agree with the Federal Court in rejecting the contention. Under the common law system of administration of criminal justice, a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such a discretion is conferred upon the Attorney General of Malaysia by art. 145(3) of the Constitution.

(ii) There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.

[14] I have carefully read the Privy Council decision in *Teh Cheng Poh*, and in my view this is the *ratio decidendi* of *Teh Cheng Poh* that the AG by virtue of art. 145(3) "has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused" and as such art. 8(1) was construed as being subject to art. 145(3).

[15] The High Court in *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740; [1997] 3 MLJ 681 summed up the decisions of *Long bin Samat* and *Johnson Tan* as follows:

(i) The importance of the propositions formulated by the learned Lord President in these two cases is that, as a matter of public law, the exercise of discretion by the Attorney General in the context of art. 145(3) is put beyond judicial review. In other words, the exercise by the Attorney General of his discretion, in one way or another, under art. 145(3), cannot be questioned in the courts by way of *certiorari*, declaration or other judicial review proceedings.

(ii) I think that the proposition is not only good law but good policy. For, were it otherwise, upon each occasion that the Attorney General decides not to institute or conduct or discontinue a particular criminal proceeding, he will be called upon to a court of law the reasons for his decision. It will then be the court and not the Attorney General who will be exercising the power under art. 145(3). That was surely not the intent on our founding fathers who framed our Constitution for us.

[16] In *Public Prosecutor v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232; [1986] 2 MLJ 100, the Supreme Court held that the AG's decision is not open to judicial review. The position was stated as follows:

(i) The law and Constitution in giving the Attorney-General an exclusive power respecting direction and control over criminal matters expect him to exercise it honestly and professionally. The law gives him a complete trust in that the exercise of this power is his and his alone and that his decision is not open to any judicial review.

(ii) If he is a Minister of the Government, he is answerable to Parliament and to his Cabinet colleagues, and if he is not, the Government will answer for him in Parliament, whilst he himself will be answerable to the Government, and if he is a civil servant he will be answerable also to the Judicial and Legal Service Commission.

[17] In *Karpal Singh & Anor v. Public Prosecutor* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; [1991] 2 MLJ 544, the Supreme Court reiterated the law on art. 145(3) as follows:

> Unlike UK, the Constitution of the Federation which is a written law is specifically declared to be the supreme law of the land. For our immediate purpose we wish to refer to art 145(3) of the Constitution which states that.. The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the court. The reasoning and logic behind such contention is well illustrated in the cases of *PP v.*

A *Lee Tin Bau* [1985] 1 MLJ 388, *Long bin Samat & Ors v. PP* [1974] 2 MLJ 152, *PP v. Datuk Harun bin Haji Idris and Ors* [1976] 2 MLJ 116 and *Poh Cho Ching v. PP* [1982] 1 MLJ 86. In the circumstances, it is superfluous to reiterate the same points.

[18] In *Mohd Rafizi Ramli v. PP* [2014] 4 CLJ 1; [2014] 3 MLJ 114, the B Court of Appeal held that the courts ought to refrain from inquiring into the AG's exercise of discretion under art. 145(3) following *DPP v. Humphrys* [1976] 2 All ER 497 where it was said:

> A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions C of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

[19] Learned counsel for the applicant relied on the principles in D *Sri Lempah Enterprise Sdn Bhd*'s case to support its contention that the exercise of discretionary power by the AG is amenable to judicial review.

[20] It must be emphasised that *Sri Lempah* is not decided by the apex court in the context of art. 145(3) of the Federal Constitution.

E **[21]** I agreed with learned Senior Federal Counsel's argument that *Sri Lempah* has no bearing on the interpretation of art. 145(3). In any event, cases such as *Zainuddin*, *Karpal Singh* and *Repco* which are cases on art. 145(3) were all decided after *Sri Lempah Enterprise*.

[22] It was also contended by the applicant that the Singapore case, *Law* F *Society of Singapore v. Phylis Tan* [2008] 2 SLR (R) 239 is an authority for the proposition that based on *Teh Cheng Poh*'s case, the AG's discretions could be challenged if the first respondent had exercised his discretion unlawfully.

[23] In my view, the case of *Phylis Tan* expressed the position between the judicial power of the courts and the prosecutorial power of the AG, as G follows:

> [144] Article 93 of the Federal Constitution provides that:
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> The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.
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> But, separately, Art 35 (8) provides that: The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.

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These two provisions expressly separate the prosecutorial function from the judicial function, and give equal status to both functions. Hence, both organs have an equal status under the Constitution, and neither may interfere with each other's functions or intrude into the powers of the other, subject only to the constitutional power of the court to prevent the prosecutorial power from being exercised unconstitutionally. Indeed, this is not even a true "interference" in as much as the exercise of a function unconstitutionally is, in effect, not an exercise of that function at all and which it is therefore the duty of the court (pursuant to the constitution itself) to prevent.

[145] *In relation to public prosecutions, Art 35(8) makes it clear that the institution, conduct or discontinuance of any criminal proceedings is a matter for only the Attorney-General to decide.* This means that, except for unconstitutionality, the Attorney-General has an unfettered discretion as to when and how he exercises his prosecutorial powers. *This also means that it is improper for the court to prevent the Attorney-General from prosecuting an offender by staying the prosecution.* (emphasis added)

[24] Learned counsel for the applicant also argues that Commonwealth decisions show that a decision not to prosecute in those jurisdictions is subject to judicial review.

[25] I agreed with the contention of learned Senior Federal Counsel that the common law principle in *ex parte* C and *ex parte* Manning cited by the applicant, in my view do not apply in Malaysia as it is based on legislation the Code for Crown prosecutors which is peculiar to England. In the circumstances, the said common law cases are not relevant or applicable in the Malaysian context which is governed by art. 145(3).

[26] The Federal Court in *Johnson Tan* had also considered the Indian position and held as follows:

The corresponding art. 76 of the Indian constitution dealing with the Attorney General in India does not contain a similar provision, merely providing by cls. (2) and (3) that:

(2) It shall be the duty of the Attorney General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney General shall have right of audience in all courts in the territory of India.

[27] It is pertinent to note that Indian decisions do not apply in Malaysia. There is no similar provision as our art. 145(3).

[28] I have analysed the authorities submitted by both parties and I agreed with the submissions of the Senior Federal Counsel that the effect and meaning of art. 145(3) has been settled by a long line of decisions of the apex courts. These courts have held that the decision of the AG to institute or not to institute criminal proceedings is not justiciable or amenable to judicial review.

[29] It must be stressed that the AG is expected to act honestly and without fear and favor. However, the avenue of the person being unhappy with his decision is elsewhere and not to the court.

MACC's Investigation Papers

[30] The applicant contended that the decision of the AG directing the MACC to close its files upon the investigation into offences committed by the Prime Minister is *ultra vires* the AG's powers under art. 145(3) of the Federal Constitution.

[31] On this issue, the AG filed an affidavit to exhibit the press statement which shows the words he used were as follows:

> Berdasarkan kepada keseluruhan fakta dan keterangan, saya sebagai Pendakwa Raya berpuas hati bahawa tiada apa-apa kesalahan jenayah yang dilakukan oleh YAB PM berkait ketiga-tiga kertas siasatan. Pada hari ini, kertas-kertas siasatan yang berkaitan akan dikembalikan kepada pihak SPRM dengan arahan supaya ketiga-tiga kertas siasatan tersebut ditutup (NFA/KUS).

[32] The AG explained in his affidavit that the letters NFA/KUS is an abbreviation for "No Further Action" and "Kemas Untuk Simpanan (tidy for keeping)" and is used as follows:

> Ini adalah arahan mengikut amalan biasa pihak pendakwaan yang diminitkan dalam kertas siasatan sekiranya tiada pendakwaan akan dibuat. Apa yang dimaksudkan dengan perkataan-perkataan "kertas siasatan ditutup (NFA/KUS)" ialah fakta dan keterangan yang dikemukakan dalam kertas siasatan tidak menzahirkan wujudnya apa-apa kesalahan jenayah.

[33] The AG said that the abbreviations were normal practice of minuting an investigation paper by the Prosecutor when there is no prosecution.

[34] It was pointed out by learned Senior Federal Counsel that the AG minute his instruction of "No Further Action" after deciding that "no offence committed by the Prime Minister" based on the existing facts and evidence in the investigation papers. The AG instructed the files to be closed since there was no further action to be taken as no offence was disclosed from the investigation papers. This is the usual practice adopted by the AGC.

[35] I have carefully considered this issue and I accept the contention of learned Senior Federal Counsel that the instruction of NFA/KUS has nothing to do with the exercise of the AG's discretion under art. 145(3). It merely relates to the instructions commonly minute in the investigation papers after a decision not to prosecute is made.

[36] In this present case, the AG as Public Prosecutor minutes his instruction of "No Further Action" after deciding that "no offence committed by the Prime Minister" based on the existing facts and evidence in the investigation papers. The AG instructed the files to be closed since there was no further action to be taken as no offence was disclosed from the investigation papers. It must be emphasised that the AG stated in his affidavit that the MACC is free to reopen the file and investigate on new evidence received:

> Saya juga mendapati bahawa tiada keperluan bagi pihak SPRM menjalankan apa-apa lagi siasatan lanjut kerana saya berpuas hati bahawa siasatan yang telah dijalankan ini adalah cukup untuk saya membuat keputusan. Oleh yang demikian tiada tindakan lanjut perlu diambil dan kertas siasatan adalah untuk dikemaskan untuk simpanan. Walau bagaimanapun ini tidak bermakna pihak SPRM tidak boleh membuka semula kertas siasatan tersebut sekiranya terdapat fakta atau keterangan yang baru.

[37] I am of the view that the minute of NFA/KUS in the investigation papers does not impede the MACC to reopen investigations on new evidence. There is, in fact, no evidence adduced to show that the MACC has been so impeded. There is no encroachment on the investigation powers of the MACC under the MACC Act. It must be stressed that pursuant to s. 29 of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) the power to carry out, investigate and report anything relating to the commission of an offence is given by the Parliament to the Commission.

[38] On the scope of s. 29 of the MACC, learned Senior Federal Counsel has correctly stated the position of the law namely:

i) every report on the commission of offences for which the MACC may investigate must be reduced to writing;

ii) if after perusing over such a report, an MACC officer finds that it raised a suspicion that an offence for which the said MACC officer may investigate, then he may initiate an investigation using all the powers under the MACC Act or the Police Act;

iii) that report and the resultant investigation is classified as SECRET unless

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a) the suspect has been charged in a court of law or;

b) the Public Prosecutor declassified it as such or;

c) an officer of the Commission of the rank of Commissioner and above, declassified it as such

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[39] It is important to note that pursuant to s. 29 of the MACC Act, the investigation papers of the MACC officer or any such papers in respect of offences under MACC Act 2009 has been opened, it is classified as SECRET by operation of law.

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[40] Hence, I accept the submission of learned Senior Federal Counsel that the applicant has no knowledge whatsoever of the facts and evidence the MACC had placed before the AG. The evidence and material which the AG considered in arriving at his decision is therefore not before this court.

[41] It must also be noted that the applicant is not challenging the validity of s. 29 of the MACC Act particularly with regards to the status of the MACC papers which by operation of law is classified as secret.

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[42] Hence, neither the court nor the applicant may have access to those MACC investigation papers.

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[43] On the facts of this case, it seems to me there is no purpose for this court to grant leave just for the purpose of investigation on full *inter parte* basis as there is no arguable case in respect of the applicant's application. (see *Tuan Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 3 CLJ 627 and *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321 applied).

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Conclusion

[44] Based on the above reasons in my view, strong reasons exist for this court to dismiss the applicant's application at this preliminary stage without proceeding to the hearing of the substantive issue.

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[45] Hence, it seems to me there is no purpose for this court to grant leave just for the purpose of investigation on full *inter parte* basis as there is no arguable case in respect of the applicant's application. (see *Tuan Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 3 CLJ 627 and *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 MLJ 321 applied).

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[46] In *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296 the Federal Court reiterated as follows:

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Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the reliefs sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review no success may be envisaged.

[47] In light of the above reasons, it is not necessary for me to consider the issue of the applicant's *locus standi*.